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Supreme Court of the United States

OCTOBER TERM, 1960

No. 568

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., THEODOR REIK, NANDOR FODOR, EDWARD FRANKEL, and SAUL GUREVITZ,

Appellants,

against

UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

(a) Reports of the Opinions in the Courts Below.

The court of original jurisdiction wrote an opinion reported in 18 Misc. 2d 722, set forth in full at folios 454-482* of the certified Record on Appeal below. The Appellate Division affirmed without opinion. The opinions of the Court of Appeals on affirming the courts below are reported in 8 N. Y. 2d 197; and are set forth in full in the Appendix hereto annexed at pages 14 to 21.

* Folio numbers refer to Record on Appeal in Court of Appeals.

Shortly after institution of the action in the name of National Psychological Association for Psychoanalysis, Inc., hereafter NPAP, as sole plaintiff, appellee unsuccessfully moved to dismiss on the ground of NPAP's lack of justiciable interest. This motion was denied on or about May 14, 1958. A copy of the relevant parts of the unreported opinion is annexed in the Appendix at page 21. A like result followed a second application on or about June 25, 1958. A copy of the unreported opinion is annexed in the Appendix at page 22. Appellee appealed from the order entered on said decision but withdrew the appeal without prejudice. Complaint and title were subsequently amended to add the four individual plaintiffs as parties (28).

A copy of the Remittitur of the Court of Appeals is annexed in the Appendix at pages 25 to 27. A copy of the order appealed from, filed in the office of the Clerk of the County of New York on July 22, 1960, is annexed in the Appendix at pages 28 to 29. A copy of the judgment filed in the same office on August 12, 1960 is annexed at pages 23 to 24.

(b) The Grounds on Which Jurisdiction of the Supreme Court of the United States Is Invoked.

(i) Appellants sued in the Supreme Court of the State of New York for a judgment declaring Article 153 of the Education Law of the State of New York unconstitutional under Article I, §§ 6 and 11, and Article III, § 1, of the New York Constitution (46, 50, 53, 56) and under the First and Fourteenth Amendments to the Constitution of the United States (46, 53, 55, 65).

(ii) The Final Order of the Court of Appeals was entered in the office of the Clerk of New York County on July 22, 1960. No application was made for re-hearing. The Notice of Appeal was served and filed on October 13, 1960 in the office of the Clerk of the County of New York with whom all papers in this proceeding had been filed, and with the Clerk of the Court of Appeals, Albany, N. Y.

(iii) Jurisdiction is conferred on this Court by Title 28 United States Code § 1257(2).

(iv) Cases sustaining jurisdiction of this Court are: *Dent* v. *West Virginia*, 129 U. S. 114; *Leonard* v. *Earle*, 279 U. S. 392; *Abie State Bank* v. *Bryan*, 282 U. S. 765; *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320; *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *First National Bank* v. *Anderson*, 269 U. S. 341; *Staub* v. *City of Baxley*, 355 U. S. 313; *Winters* v. *People of State of N. Y.*, 333 U. S. 507; *Lovell* v. *City of Griffin*, 303 U. S. 444; *McCollum* v. *Board of Education*, 333 U. S. 203; *People of State of N. Y.* v. *Zimmerman*, 278 U. S. 63; *Hill* v. *Smith*, 260 U. S. 592; *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653; *Wilson* v. *Cook*, 327 U. S. 474; *Brown* v. *Western Ry.*, 338 U. S. 294; *Doremus* v. *Board of Education*, 342 U. S. 429; *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Connally* v. *General Construction Co.*, 269 U. S. 385; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

(v) The validity of Article 153 of the Education Law of the State of New York, §§ 7601 to 7614, is involved. Parts of and abstracts from the statute, pertinent to the constitutional issues are set forth in the annexed Appendix at pages 30 to 33.

(c) The Questions Presented by the Appeal.

1. Is Article 153 of the Education Law of the State of New York, comprising Education Law §§ 7601 to 7614, hereafter Statute, unconstitutional as applied to appellants, in that it abridges their freedom of speech, their privileges and immunities as citizens of the United States, deprives them of property without due process of law, and denies them the equal protection of the laws, in violation of the First and Fourteenth Amendments to the United States Constitution?

2. Is the Statute so vague and indefinite as to effectively threaten to deprive NPAP of the value of its charter because of lack of legislative standards for compliance by an institution perpetuating its existence by training for membership persons who could, absent the Statute, call themselves psychologists and render psychological services for remuneration, in violation of its rights under the Fourteenth Amendment?

3. Is the Statute so vague and indefinite that enforcement violates the First Amendment and the Due Process Clause of the Fourteenth Amendment, by depriving the individual plaintiffs of the right to call themselves psychologists and to render services as such without certification and subsequent biennial registration?

(d) Statement of the Case.

The Statute in effect April 17, 1956, as amended, provides that after October 1, 1958 it is unlawful for any person to call himself a psychologist and to hold himself out to the public as rendering psychological services, unless certified under its provisions.

NPAP is a membership corporation chartered under the Membership Corporations Law of the State of New York with appellee's consent, having a membership of about

80 and about 200 members-in-training at the time of the institution of the action (32, 41). Since its organization it had offered and continues to offer more than 50 seminars, courses of study, and supervised practice in psychology to train persons as psychologists and psychoanalysts so that they may qualify for membership therein, enrollment of trainees being limited to candidates for membership (34). Successful completion of its training for membership qualifies persons to render psychological and psychoanalytical services to individuals, corporations, and to the public, and to describe themselves properly as psychologists and such services as psychological (35-38). It published and continues to publish a learned quarterly on psychoanalytic psychology (39).

When the action was instituted on March 5, 1958 with NPAP as sole plaintiff, all the individual plaintiffs had been denied certification (62). After the New York Supreme Court had denied defendant's motion to dismiss for NPAP's lack of standing, the parties stipulated to add the four individual plaintiffs as parties and to amend the complaint. The motion for summary judgment was served on February 20, 1959. Plaintiff Theodor Reik was certified on March 11, 1959. The Supreme Court decision deciding that the Act was not unconstitutional was published on May 28, 1959. On June 23, 1959 defendant certified plaintiff Frankel, and Gurevitz on June 26, 1959. On July 1, 1959, notice of appeal to the Appellate Division of the Supreme Court was served. Plaintiff Fodor was certified by defendant on December 17, 1959.

However, their certification does not eliminate them from the case, because they continue to be subject to §§ 7606 and 7607 of the Statute, requiring biennial reregistration and fee payments, under pain of various penalties, including penal sanctions and revocation of certificate (Appendix p. 33).

The federal questions sought to be reviewed were raised in the pleading, arguments and briefs (45, 46, 49, 50, 52,

53, 55, 57, 62-65, 141, 171, 182). The Court of Appeals passed on these issues in the following language:

> ". . . it cannot be gainsaid that the statute is reasonably related to the public health and welfare, and thus constitutes a proper exercise of the State's police power under the due process clause of the State and Federal Constitutions, Const. art. 1, § 6; U. S. Const. Amend. 14."

For these reasons, and for the reasons hereinafter set forth, the nature of the case and the opinions of the courts below are such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain jurisdiction.

(c) The Federal Questions Are Substantial.

A statute which makes the peaceful enjoyment of freedoms guaranteed by the federal constitution contingent on the uncontrolled will of an official, as by refusing a license which may be granted or withheld in his discretion, is unconstitutional.

Staub v. *City of Baxley*, 355 U. S. 313.

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement. The crime must be defined with appropriate definitions. 'Cantwell v. Conn., 310 U. S. 296' . . . There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty . . . in regard to the applicable tests to ascertain guilt."

Winters v. *New York*, 333 U. S. 507.

The Statute at bar offends under both doctrines (Education Law, Article 153, §§ 7601-7608).

The Statute threatens to deprive NPAP of the value of its charter in violation of the due process clause of the Fourteenth Amendment, and violates the rights of the individual appellants under the First and Fourteenth Amendments, precisely as the court below had found sufficient to strike down a section of the Education Law requiring registration for private schools on pain of criminal sanctions, in *Packer Collegiate Institute* v. *University of the State of New York*, 298 N. Y. 184 (1948), because that statute gave defendant the power to create and enforce the regulations without standard or limitation.

A correct analysis of the opinion of the New York Court of Appeals sustaining the Statute at bar demonstrates that it violates NPAP's rights, privileges and immunities under the due process clause of the Fourteenth Amendment, and the rights of the individual plaintiffs under the First and Fourteenth Amendments.

Vital to a proper resolution of the federal constitutional issues are these facts: 1) the Statute does not define psychology nor psychological services; 2) the Statute does not prohibit the non-certificant from calling himself a psychologist; 3) the Statute does not prohibit the non-certificant from rendering psychological services to the public for remuneration; 4) the Statute does prohibit, under penal sanctions, the non-certificant from calling himself a psychologist *and* rendering psychological services for remuneration.

Although appellee contended in the Court of Appeals in June 1960 that the action was moot as to the individual plaintiffs because of their certification subsequent to the institution of the action, that court said: "Since the question involved is of important public interest and one likely

to arise again, we deem it appropriate to entertain the appeal on the merits." It should be noted at this point that appellee was mistaken in this contention, because the individual appellants continue to have standing by virtue of their continuing to be subject to the statutory requirements of biennial registration, payment of fees, and penalties for violations (§§ 7606, 7607, 7608).

Leonard v. *Earle*, 279 U. S. 392.

In deciding that the Statute was "reasonably related to the public health and welfare" because official certification helps the public to identify those with "appropriate training and background and affords protection against the incompetent by providing a 'yardstick' by which the public can judge the competence of persons offering 'psychological services'", the court below begged the entire issue presented for adjudication: that there is deprivation of due process (Fourteenth Amendment) and of free speech (the First), when appellants were deprived of rights theretofore enjoyed, by legislation bare of meaningful or enforceable legislative standards.

Finding that the lack of definition of psychology and psychological services was no legislative oversight, but had resulted from failure of interested groups to agree on definitions, the court concluded that it was proper to leave the definitions and setting of "clearly discernible" standards to the Board of Examiners (§ 7603) and to the Advisory Council (§ 7604). But the statutory standards for qualifications of members of Board and Council are couched in the same undefined terms (§§ 7603, 7604).

By failing to define *psychology* and *psychological services* (§ 7601), the Statute provided no standards for qualifying the officials charged with administering it: The Board of Examiners (§ 7603, "three members who engage in *rendering services in psychology*"), or the Advisory

Board (§ 7604, "three-quarters of its membership shall be broadly representative of psychologists *engaged primarily in rendering psychological services* . . . to aid in the formulation of policy"), nor for setting a "*satisfactory* examination in psychology" (§ 7605), nor for acceptance or rejection of a doctoral degree based on a program of studies "whose content was *primarily psychological*" or "its *substantial equivalent* in both subject matter and extent of training (§ 7605), nor for satisfactory "supervised experience in rendering '*psychological services*'", nor for "*appropriate training and background*" in the "*profession of psychology*".

No standard or guide whatever is stated even in general terms in the Statute to indicate the subject matter which may be covered by administrative regulations, or the limits thereto, to enable the courts to determine in contested cases whether the legislative will has been followed or, indeed, what the legislative policy is. The delegation of legislative power appears so flagrant as to clearly deprive appellants of the protection of the First and Fourteenth Amendments. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 418, 420, 428-432; *Schecter Poultry Corp.* v. *United States*, 295 U. S. 495; *Yakus* v. *United States*, 321 U. S. 414, 425; *Woods* v. *Miller Co.*, 333 U. S. 138, 144-145.

The Court of Appeals misunderstood appellants' position when it characterized as "thoroughly untenable" their argument that there is no unified concept of psychology nor generally accepted definition, and that the constitutional infirmity lies in the Statute's lack of definition. From this it does not follow that the legislature may not constitutionally regulate psychologists. The legislature would have the power, if there were divergences of opinion as to the meaning and orbit of the profession, to adopt a definition, as have other legislatures, having some reasonable basis. It was the legislature's calculated evasion of that very issue that deprived appellants of their constitutional rights.

The court's reference to the Governor's message of approval of the Statute (Public Papers of Gov. Harriman, 1956, pp. 416-417) indicates that the federal questions are substantial. The Governor had noted that the Statute was "the result of the joint efforts of the Commissioner of Mental Hygiene, the State Education Department, the Joint Council of New York State Psychologists on Legislation, the New York State Medical Society, the American Psychological Association, and the American Psychiatric Association." They had obviously been unable to agree on definitions of psychology and psychological services. And so the argument goes, that burden could be left constitutionally to those who had rendered "psychological services" for a number of years (§§ 7603, 7604), with the aid and help of the Commissioner of Education, president of the appellee and head of the Department of Education. Without legislative restraint or hindrance, out of the many whose "joint efforts" had produced the Statute, to these few qualified by undefined qualifications, is left the burden of defining the "substantial equivalent" of educational qualifications, equivalencies of the master's and doctor's degrees, "psychological services" sufficient for the application of criminal sanctions, sufficient to deprive NPAP of the value of its charter and to deprive the right heretofore enjoyed by the individual appellants to call themselves psychologists and to render "psychological services", without the necessity of certification, or biennial registration, or danger of revocation of certification, etc. As the Statute is written, a task found beyond the combined efforts of organized medicine, organized psychology, and the entire State Education Department (appellee), was passed to a small segment of these groups.

The unconstitutionality of the Statute is indicated by the fact that one member of the Court of Appeals concurred "on the assumption that this statute affects the use of the title 'psychologist' only in conjunction with services rendered to individuals in the solution of personal prob-

lems or treatment of illness." This gratuitous assumption is dehors the Statute. It is brought to the attention of this court as indicating that appellants were deprived of due process, the individuals in not being permitted to correctly describe their activity and in being prohibited from using the word unless they qualified to the satisfaction of officials who were given no statutory guides for setting reasonable standards, or by which to measure satisfactory education, experience, and set examinations.

NPAP would not have an adequate remedy if its members were obliged to await prosecution or other enforcement action, for whatever the ultimate outcome of defense, it would have suffered a serious loss of members-in-training, with attendant destruction of the value of its charter. In similar situations a party was not confined to invoking his own rights. He may invoke as well the related rights of others. That NPAP by itself has standing to challenge the Statue under the Fourteenth Amendment is clear from the decisions of this court. *Thornhill* v. *Alabama*, 310 U. S. 88, 96; *Buchaman* v. *Warley*, 245 U. S. 60; *People* v. *Crane*, 214 N. Y. 154, 159-160; *Lovell* v. *Griffin*, 303 U. S. 444; *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Columbia Broadcasting System* v. *United States*, 316 U. S. 405; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

A substantial federal question is presented by the individual plaintiffs despite their certification after the institution of the action, by reason of the continuing requirement under criminal and other sanctions, that they register biennially, pay fees therefor (§ 7606), and the continuing threat of revocation of certificate for "fraud or deceit in connection with his services rendered as a psychologist" or for being "guilty of unprofessional conduct" (§7607) (62-63). There is no legislative indication of what "psychological services" may be, nor standard for judging the "unprofessional" conduct of the certificant.

Connecticut, Florida, Maine, Maryland, Minnesota, New Hampshire, Virginia and Washington have similar psychology certification statutes without definition of the "profession", or orbit of permissible activity. Arizona, California, Georgia, Kentucky and Tennessee have psychology statutes with a definition of psychological services. The national interest in the issue may be indicated by the fact that after the Florida statute had been declared unconstitutional on July 27, 1960, the Chairman of its Board of Examiners published for national circulation the statement: "If the attorneys in other states cite this Florida decision in efforts to upset their own state laws, national repercussions may ensue."

That case, heretofore unreported, in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, in Chancery No. 16885, *Cassel* v. *Husband, et al.*, declared a psychology certification statute similar to the Statute at bar, unconstitutional in the following language:

> "These decisions establish the principle that unlimited discretion may not be vested in an examining board to control the educational requirements of persons applying to practice a profession in this state. Section 490.04(c) would require applicants for certificates of proficiency as psychologists to have graduated from 'a university approved by the board as maintaining satisfactory standards' without fixing any measure by which the board must be satisfied or the scope of the standards to be required. Section 490.04(d) would require that applicants have 'at least one year's experience in the field of psychology, of a grade, character, and time distribution satisfactory to the board' again without fixing any measure by which the board must be satisfied.
>
> "It is significant that the board is required to 'adopt rules and regulations *for its own proceedings and government*, and for the *examination* of candidates for certificates', but is neither required or *authorized* to

adopt rules fixing standards by which universities are to be determined to be 'satisfactory' or defining what 'grade, character and time distribution' of experience is to be 'satisfactory to the board'."

The judgment of the Court of Appeals at bar did not rest on mere construction of the Statute nor on sufficient independent state ground, but on characterization bearing on its constitutional effect. Appellants are entitled to the judgment of this court of its operation and effect on their rights under the First and Fourteenth Amendements. *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346; *Crew Levich Co.* v. *Pennsylvania*, 245 U. S. 292; *Storaasli* v. *Minnesota*, 283 U. S. 57; *Durley* v. *Mayo*, 351 U. S. 277.

It is respectfully submitted that a plenary consideration of the basic questions presented on this appeal, and a statement of this Court's position after such consideration, will avoid further confusion and a multiplicity of further suits arising from this and similar statutes.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

No. 174.

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., & ORS.,

Appellants,

vs.

UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

FROESSEL, J.:

The constitutionality of Article 153 (§§ 7601-7614) of the Education Law (L. 1956, ch. 737), which deals with the certification of psychologists, was unsuccessfully challenged by plaintiff membership corporation dedicated to the advancement of psychoanalysis (herein called NPAP), and four of its members, each of whom has since been certified under the statute. Since the question involved is of important public interest and one likely to arise again, we deem it appropriate to entertain the appeal on the merits (*Matter of United Press Assns.* v. *Valente*, 308 N. Y. 71, 76).

Drafted by State agencies and interested professional groups, and widely approved by the psychological fraternity (see Governor's Message, and Memoranda and Mental Hygiene Departments, in McKinney's 1956 Session Laws, pp. 1684, 1928-1929), Article 153 is a certification rather than a licensing law, *i.e.*, it does not prohibit anyone from rendering psychological services, but proscribes the professional use by non-certificants of the title

"psychologist" and its derivatives for remuneration. Section 7602 prohibits non-certified individuals from representing themselves as psychologists, and section 7601 defines a person who "represents himself to be a 'psychologist'" as one who

> "holds himself out to the public by any title or description of services incorporating the words 'psychological', 'psychologist' or 'psychology', *and under such title or description offers to render or renders services to individuals, corporations, or the public for remuneration.*" (Emphasis supplied.)

Section 7605 empowers the Department of Education to issue "a certificate as psychologist" to a citizen (or one who has declared his intention), of good moral character, at least 21 years of age, who pays a $40 fee, "passes a satisfactory examination in psychology", has "received the doctoral degree based on a program of studies whose content was primarily psychological from an educational institution having a graduate program registered by the department, *or its substantial equivalent in both subject matter* and extent of training" (emphasis supplied), and has had "at least two years of satisfactory supervised experience in rendering psychological services". For a specified period, the Board is empowered to waive examination for those meeting prescribed standards of academic achievement and professional experience.

The statute further provides for biennial registration of certified psychologists (§ 7606); non-disclosure of privileged communications (7611); and revocation or suspension of certificates, after notice and hearing before the Commissioner of Education, with the right of judicial review by way of an Article 78 proceeding of the suspension, revocation, "or refusing to issue or renew a certificate" (§ 7607). Employees of governmental agencies and chartered educational institutions are exempted from the opera-

tion of the statute (§ 7609); the practice of medicine is not authorized (§ 7610); and violation of the statute is made a misdemeanor (7608).

Article 153 was designed to accomplish a twofold purpose. On the one hand, it "recognizes and gives status to the profession of psychology" (Governor's Message, *supra*) by "giving qualified psychologists official recognition" (Memo., Mental Hygiene Dept., *supra*), and by placing the "confidential relations and communications" between a registered psychologist and his client "on the same basis as those provided by law between attorney and client" (§ 7611). In this aspect, its sponsors felt that the statute would encourage bona fide psychologists with university training and professionally supervised experience to offer their needed professional services to the public in increasing numbers.

On the other hand, it was "apparent to all who are concerned with the field of public health that the public (was) entitled to protection in the form of state supervision" over the increasingly important field of psychology (Memo., Education Dept., *supra*). By prohibiting the use of the word "psychologist" and its variants in connection with the rendition of professional services for pay, it was felt that the statute would "make it possible to eliminate unqualified persons who are presently able to hold themselves out to the public as psychologists" (Memo., Education Dept., *supra*), and help to protect the public against charlatans and quacks who, despite inadequate training and professional experience, guarantee easy solutions to psychological problems.*

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* See note, 51 Columbia L. R. (1951) 474, which points up "the selling power of the term 'psychologist' and its variants" and the importance, in terms of practical protection to the public, of proscribing "the professional use by non-certificants of the very terms which have apparently captured the popular imagination" (pp. 484-485).

Aside from the presumption of constitutionality which must be accorded a legislative enactment (*Lincoln Bldg. Associates* v. *Barr*, 1 N. Y. 2d 415), it cannot be gainsaid that the statute is reasonably related to the public health and welfare, and thus constitutes a proper exercise of the State's police power under the due process clause of the State and Federal Constitutions. Through the medium of official certification of qualifications, it helps the public to identify those who have appropriate training and background in the profession of psychology. At the same time, it affords protection against the incompetent practitioner by providing a yardstick by which the public can judge the competence of persons offering psychological services.

We have upheld the certification as opposed to the complete licensing approach in the fields of accountancy (*Berkowitz* v. *Wilson*, 307 N. Y. 851, and plumbing (*People ex rel. Nechamcus* v. *Warden, etc.*, 144 N. Y. 529), and, as stated in the latter case (at 538-539), "if the act is a step in the direction of something which will enure to the public health and comfort, that it does not go as far as it might, is not a reason for invalidating it".* Since "we may not, of course, substitute our judgment for that of the Legislature as to the wisdom or expediency of the legislation" (*Thompson* v. *Walling*, 301 N. Y. 476, 488, affd. 342 U. S. 485, 801, 951), the strong convictions expressed by plaintiffs against the soundness and efficacy of the statute have no bearing on its constitutionality (see *Beauharnais* v. *Illinois*, 343 U. S. 250, 262; *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 406-407, app. dismd. 242 U. S. 618).

The constitutional arguments pressed on this appeal revolve around the fact that the statute does not contain

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* See also former Art. 56 of the Education Law (L. 1927, ch. 85, § 1476), which, as noted in *Roth* v. *Hoster Realty Co., Inc.*, 119 Misc. 686, was "directed solely against the assumption of the title *architect or registered architect*" (emphasis supplied), and did "not forbid the practice of the profession or occupation generally."

a formal definition of "psychologist" or its proscribed derivatives. Plaintiffs contend that the absence of such a definition renders the statute violative of due process in two respects: (1) it arbitrarily restricts the carrying on of a lawful occupation in that it prohibits a non-certified psychologist from truthfully describing his professional services, and (2) the statute's qualifying standards are meaningless without a definition to which they can attach, and hence the statute unlawfully delegates legislative power without accompanying standards to guide the exercise of administrative discretion.

The omission of a formal definition of "psychology" or its variants was no legislative oversight. Attempts to draft a definition that would sufficiently delineate the nature and scope of psychology had failed (Memos., Mental Hygiene and Education Depts., *supra*), and, as noted by Special Term, "the law was enacted in a form that was acceptable to interested groups and that requires no interpretation of that term for its enforcement". The standards of fitness established by the Legislature imbue the title "psychologist" with meaningful content, and a person with a bona fide claim to that title will meet those qualifications and be accorded official recognition, as were the individual plaintiffs herein. To "assure adequate representation of the diverse fields of psychology" on the State Board of Examiners, the Legislature specifically provided that

> "the board shall at all times, except for vacancies, have two members representing the training institutions in psychology, three members who engage in rendering services in psychology and two members who devote a majority of their time to rendering services in psychology." (§ 7603)

The membership of the Advisory Council established by the Legislature to "aid in the formulating of policy" was

likewise apportioned among professional practitioners and "representatives of the professional training centers" to insure that it would be "broadly representative of psychology" (§ 7604).

That the Legislature assigned to respondent the task of implementing the statute—by recognizing accredited psychology courses in the graduate curriculums of chartered institutions, by determining the scope of the qualifying examination, by fixing the "substantial equivalent" of a doctoral degree, and by deciding what constitutes "satisfactory supervised experience"—does not constitute an invalid delegation of legislative power (*Matter of Marburg* v. *Cole*, 286 N. Y. 202, 211-212; *Matter of City of Utica* v. *Water Control Bd.*, 5 N. Y. 2d 164). The statute prescribes clearly discernible standards to govern the exercise of the power of certification, and it was

> "proper and fitting for the Legislature to assign broad functions to the Board, particularly when it was contemplated and understood that its members were to bring to their work a familiarity with conditions which the individual legislators could not be expected to possess." (*Matter of City of Utica* v. *Water Control Bd., supra*, 5 N. Y. 2d at p. 170.)

While plaintiffs maintain, on the one hand, that there is as yet "no unified concept of what psychology is", nor a "generality accepted definition of psychology, psychologists or psychological services", they nonetheless contend, on the other hand, that the constitutional infirmity in the statute lies in its failure to define those very terms. They recognize that the profession of psychology is affected with a public interest, and hence subject to regulation under the police power. Yet the end result of their argument is that the Legislature may not constitutionally regulate psychologists, since the title and the field are incapable of

precise definition, and a statute without such definition is invalid.

The short answer to this thoroughly untenable argument is that section 7605, in practical effect, defines a psychologist as an individual who meets prescribed standards of fitness, and since the statute merely proscribes *the use of specific words* to *describe* the rendition of services, without making it criminal for non-certificants to render such services, no further definition of that term is constitutionally required or necessary (see *Pitts* v. *State Bd. of Examiners of Psychologists*, —— Md. ——, 160 A. 2d 200, 201). The statute is easily complied with by the non-use of particular words, and hence it completely "satisfies the requirement that a criminal statute must be sufficiently definite, 'clear and positive' to give 'unequivocal warning' to citizens of the rule which is to be obeyed" (*People* v. *Firth*, 3 N. Y. 2d 472, 474).

Plaintiffs' real quarrel with the statute is not that it lacks a formal definition of "psychologist", but that the definition adopted—by way of qualifying standards—does not meet with their approval. NPAP conducts a training program for members-in-training, and respondent has refused to accept that program as satisfying the academic requirements of the statute, contrary to NPAP's expectation at the time it supported the statute. The major portion of plaintiffs' affidavits, as well as their complaint, is devoted to the merits of NPAP's training program, and why it should qualify as a "substantial equivalent" of "the specialized advanced courses in psychological theory and professional skills in a typical graduate psychology program given by degree-granting institutions leading to a degree of Doctor of Philosophy in psychology". However, a disagreement with the judgment of the Legislature as to the proper standards of fitness for persons wishing to be certified in their craft cannot rise to the level of a constitutional argument by couching that disagreement in the

language of due process or equal protection of the laws. If certification is denied to one of NPAP's members, and he can establish that respondent's refusal to accept his training as a "substantial equivalent" of formal university training was an arbitrary abuse of administrative discretion, then he may obtain the necessary relief in the courts by way of an Article 78 proceeding (§ 7607(3); see *Matter of Marburg* v. *Cole, supra*).

As to plaintiffs' contention that "the issue of constitutionality cannot be determined without a trial"—which is inconsistent with their motion for summary judgment—the issues of fact which assertedly exist all go to the wisdom and efficacy of the statute, and have no bearing on its constitutionality.

The judgment should be affirmed, with costs.

• • •

Judgment affirmed, with costs. Opinion by Froessel, J. All concur; Van Voorhis, J., concurs on the assumption that this statute affects the use of the title "psychologist" only in conjunction with services rendered to individuals in the solution of personal problems or treatment of illness.

APPENDIX

First Unreported New York Supreme Court Opinion Sustaining Justiciable Interest of NPAP

Plaintiff brings this action for judgment declaring that a certain statute is unconstitutional. Defendant moves to dismiss upon the grounds that plaintiff has failed to show a sufficient interest to maintain the action. The statute in question is an amendment to the Education Law in relation to psychology. It is sufficiently described for the purposes of this motion to say that it prescribes . . . the

requisites for a certificate as a psychologist and the penalties for one lacking such certificate for representing himself as a psychologist. Plaintiff is a membership corporation organized to establish professional standards in the practice of psychology. Its members are practicing psychologists. It operates a training program to qualify persons taking the course to become its members. It publishes a quarterly journal in the field. The complaint alleges that it does not grant degrees but that its training program is equivalent of the program of institutions that do grant doctorate degrees in psychology. Only a person directly affected by a law may bring an action to challenge its constitutionality (Schiefflin v. Komfort, 212 N. Y. 520). A membership corporation may be such a person (Oneida County Forest Preserve Council v. Wehle, 309 N. Y. 152). It is plaintiff's claim that this statute affects it in two ways —as an association it will render its purposes nugatory in that its educational program will no longer attract students of the subject. And it will affect its members individually, especially those designated as in training, in ways that are obvious. The motion is consequently denied.

APPENDIX

Second Unreported New York Supreme Court Opinion Sustaining Justiciable Interest of NPAP

Defendant moves for dismissal of the complaint for insufficiency upon the ground that the complaint fails to show that plaintiff has the requisite interest to enable it to maintain this action and that there is no existing justiciable controversy. The court has considered the points urged by the parties and reaches the conclusion that the determination by the court upon defendant's prior motion to dismiss is correct. The motion to dismiss upon the grounds urged is denied.

APPENDIX

Judgment

Index No. 40446-1958

SUPREME COURT,

NEW YORK COUNTY.

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., THEODOR REIK, NANDOR FODOR, EDWARD FRANKEL, and SAUL GUREVITZ,

Plaintiffs,

against

UNIVERSITY OF THE STATE OF NEW YORK,

Defendant.

The above-named plaintiffs having appealed to the Court of Appeals from a judgment of the Appellate Division of this court, First Department, entered in the office of the Clerk of the County of New York on the 25th day of March, 1960, affirming the judgment entered therein on the 8th day of June, 1959, in the office of the Clerk of the County of New York and the Court of Appeals having heard said appeal, and ordered and adjudged that the judgment of the Appellate Division so appealed from be affirmed with costs and the remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of New York and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this court, and directing the entry of a judgment herein, with costs of said appeal to be taxed against National Psychological Association for Psychoanalysis, Inc., Theodor Reik, Nandor Fodor, Edward Frankel, and Saul Gurevitz.

Appendix

Now on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant, it is

ADJUDGED that the judgment in this action entered on the 25th day of March, 1960, be, and the same hereby is affirmed, and that the defendant, University of the State of New York, recover of the plaintiffs, National Psychological Association for Psychoanalysis, Inc., Theodor Reik, Nandor Fodor, Edward Frankel, and Saul Gurevitz the sum of 164-25/100 dollars costs as taxed and the defendant have execution therefor.

Dated: New York, New York, August 12, 1960.

JAMES McGURIN,
Clerk.

Defendant University of the State of New York is located at State Campus, Albany, New York.

The principal office of plaintiff National Psychological Association for Psychoanalysis, Inc. is located at 66 Fifth Avenue, New York.

Plaintiff Theodor Reik resides at 401 West End Avenue, New York, N. Y.

Plaintiff Nandor Fodor resides at 1148 Fifth Avenue, New York, N. Y.

Plaintiff Edward Frankel resides at 7 East 78th Street, New York, N. Y.

Plaintiff Saul Gurevitz resides at 680 West End Avenue, New York, N. Y.

APPENDIX

Remittitur of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals at Court of Appeals Hall, in the City of Albany on the 8th day of July in the year of our Lord One Thousand Nine Hundred and Sixty, before the judges of said Court.

WITNESS: The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk

Remittittur, July 8, 1960

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC. & ORS.

v.

UNIVERSITY OF THE STATE OF NEW YORK

BE IT REMEMBERED, that on the 4th day of May in the year of Our Lord One Thousand Nine Hundred and Sixty National Psychological Association for Psychoanalysis, Inc. & Ors. the appellants in this cause, came here unto the Court of Appeals by Lyman Stansky their attorney, and filed in the said court a Notice of Appeal and return thereto from the justices of the Appellate Division of the Supreme Court in and for the First Judicial Department and University of the State of New York the respondent

in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General;

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed

WHEREUPON, the said Court of Appeals having heard the cause argued by Mr. Osmond K. Frankel of counsel for the appellants, and by Mr. Samuel A. Hershowitz of counsel for the respondent, brief filed by Amicus Curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs,

And it was also further ordered, that the records aforesaid, and the proceedings in this court, be remitted to the Supreme Court of the State of New York there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals of the State of New York, by it given in the premises, are by the said Court of Appeals remitted to the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in said Supreme Court, before the justices thereof, etc.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals Clerk's Office
Albany, July 8, 1960

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

SEAL

RAYMOND J. CANNON,
Clerk.

APPENDIX

Order Appealed From

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the Court-house thereof, Pearl and Centre Streets, in the Borough of Manhattan, City and State of New York, the 22 day of July, 1960.

Present: Hon. Birdie Amsterdam, Justice.

National Psychological Association for Psychoanalysis, Inc., Theodor Reik, Nandor Fodor, Edward Frankel, and Saul Gurevitz, Plaintiffs-Appellants, *against* University of the State of New York, Defendant-Respondent.	Order Index No. 40446-1958

The above named plaintiffs having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, First Department, entered on the 21st day of March, 1960, in the office of the Clerk of the County of New York, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed with costs, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of New York,

Now, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the defendant, it is

ORDERED that said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this Court; and that the judgment entered herein on the 21st day of March, 1960, be and the same hereby is affirmed, and that a judgment of this Court be entered herein affirming said judgment, with costs of said appeal to be taxed against National Psychological Association for Psychoanalysis, Inc., Theodor Reik, Nandor Fodor, Edward Frankel and Saul Gurevitz.

Enter

(sgd) BIRDIE AMSTERDAM
Justice of the Supreme Court

Filed
July 22, 1960
New York
County Clerk's Office

APPENDIX

The New York Statute

§ 7601.2. A person represents himself to be a "psychologist" when he holds himself out to the public by any title or description of services incorporating the words "psychological", "psychologist" or "psychology", and under such title or description offers to render or renders services to individuals, corporations, or the public for remuneration.

§ 7602. After July first, nineteen hundred fifty-seven no individual shall represent himself as a psychologist within the meaning of this act other than those certified and registered under the provisions of this action.

§ 7603 provides for the department to appoint a Board of Examiners on the recommendation of the commissioner to examine applicants. The board as first appointed "shall be persons who have been engaged in rendering service, teaching or research in psychology for a period of at least five years . . . the board shall at all times . . . have two members representing the training institutions in psychology, three members who engage in rendering service in psychology, and two members who devote a majority of their time to rendering service in psychology."

§ 7604 provides for an Advisory Council of twelve to eighteen members to be appointed by the Regents on recommendation of the Commissioner, to be "broadly representative of psychology", "one-quarter of the membership of the Council shall consist of the representatives of the professional training centers and three-quarters of its membership shall be broadly representative of psychologists engaged primarily in rendering psychological services." Its function is "to aid in the formulation of policy."

§ 7605.1. The department shall issue a certificate as psychologist to any person who pays a fee of forty dollars, who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the department that he: a. Is at least twenty-one years of age. b. Is of good moral character. c. Is a citizen of the United States or has legally declared his intention of becoming such a citizen. d. Has received the doctoral degree based on a program of studies whose content was primarily psychological from an educational institution having a graduate program registered by the department, or its substantial equivalent in both subject matter and extent of training. e. Has had at least two years of satisfactory supervised experience in rendering psychological services.

2. Examinations for applicants under this act shall be held by the department twice each year. Subject to the approval of the department, the board shall determine the subject and scope of the examinations. Written examinations may be supplemented by such oral examinations as the department shall determine upon recommendation of the board . . .

3. Until July first, nineteen hundred fifty-eight, the board may waive the examination requirement, and the requirement of paragraph e of subdivision one of this section, and may grant a certificate upon payment of a fee of forty dollars to a person who meets the requirements of paragraphs a, b and c of subdivision one of this section and who either:

a. Has a doctor's degree or equivalent thereof from an institution whose programs are registered by the department or which is a member of, or accredited by an accrediting agency recognized by the department, based on a program which is primarily psychological, or the substantial equivalent thereof in both subject matter and

extent of training and in addition has had five years of professional experience satisfactory to the board; or

b. Has a master's degree or the equivalent thereof from an institution whose programs are registered by the department or which is a member of, or accredited by an accrediting agency recognized by the department, based on a program which was primarily psychological, or the substantial equivalent thereof in both subject matter and extent of training, and in addition has had eight years of professional experience satisfactory to the board.

4. Any person who applies on or before July first, nineteen hundred fifty-nine may be admitted to the examination provided he has the qualifications set forth in paragraphs a, b and c of subdivision one of this section, and has had prior to July first, nineteen hundred fifty-eight at least eight years of professional experience in rendering psychological services of a scope and character satisfactory to the board.

5. Any person who applies on or before July first, nineteen hundred fifty-nine may be granted a certificate without examination provided he has the qualifications set forth in paragraphs a, b and c of subdivision one of this section and has had prior to July first, nineteen hundred fifty-eight at least twelve years of professional experience in rendering psychological services of a scope and character satisfactory to the board . . .

6. In determining the acceptability of the applicant's professional experience, the board may require such documentary evidence of the quality, scope and nature of the applicant's experience as it deems necessary. . . . The determination of the board in respect to experience shall be subject to review by the commissioner at the request of the applicant, in accordance with regulations which the commissioner may adopt. . . .

§ 7606 requires biennial registration for all certificants, and payments of biennial fees therefor, the penalties for failure to register bienially including penal sanctions and loss of certificate.

§ 7607.1. The certificate of any psychologist may be suspended or revoked by the commissioner upon proof that the psychologist: . . .

b. has been guilty of fraud or deceit in connection with his services rendered as a psychologist or in establishing his qualifications under this act; or . . .

f. has been guilty of unprofessional conduct as defined by rules established by the board of regents . . .

§ 7608. Except as hereinafter in this article provided after October first, nineteen hundred fifty-eight, any person not a certified psychologist who shall represent himself as a psychologist, as defined in this article, or who shall violate any of the provisions of this article relating to psychology . . . shall be guilty of a misdemeanor and, upon conviction, shall be punishable by imprisonment for not more than six months, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment, and each violation shall be deemed a separate offense.

FILE COPY

FILED
JAN 6 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM—1960

No. 508

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., THEODOR REIK, NANDOR FODOR, EDWARD FRANKEL and SAUL GUREVITZ,

Appellants,

against

UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WATSON
Assisant Attorney General
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., THEODOR REIK, NANDOR FODOR, EDWARD FRANKEL and SAUL GUREVITZ,

Appellants,

against

UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

The University of the State of New York, appellee herein, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves this Court to dismiss or affirm, with costs, the appeal taken herein to this Court by the National Psychological Association for Psychoanalysis, Inc., Theodor Reik, Nandor Fodor, Edward Frankel, and Saul Gurevitz, appellants, upon the ground that there is no substantial federal question involved and that it is devoid of merit, that the appeal is moot as to the individual appellants and that the corporate appellant lacks standing to maintain this appeal.

Dated: New York, N. Y., January 3, 1961.

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Appellee.

Opinions Below

The opinion of the New York Supreme Court, New York County, directing the entry of judgment declaring that Article 153 of the Education Law of the State of New York is not unconstitutional, is reported in 18 Misc. 2d 722, 188 N.Y.S. 2d 151.

The Appellate Division, First Department, affirmed without opinion (10 A. D. 2d 688). The judgment of the Appellate Division was affirmed by the New York Court of Appeals. Its opinion is reported in 8 N. Y. 2d 197. The remittitur of the Court of Appeals is annexed to the jurisdictional statement at pages 25-27.

Jurisdiction

This is an appeal from a judgment of the Court of Appeals of the State of New York, dated July 8, 1960, which unanimously affirmed a judgment of the Appellate Division, First Department, dated March 21, 1960, which, in turn, affirmed a judgment of the Supreme Court, New York County, dated June 20, 1959, adjudging that Education Law, Article 153 was *not* unconstitutional.

The appellants contend that this Court has jurisdiction on the ground that substantial constitutional questions are presented. The appellee contends that such issues are unsubstantial and utterly devoid of merit and that appellants presently lack standing, and that as to the individual appellants, the appeal is moot.

Statute

The statute involved is Article 153 of the Education Law of the State of New York.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Introduction

The action resulting in the judgment appealed from was brought for a declaratory judgment declaring New York Education Law, Article 153, comprising §§ 7601 to 7614, unconstitutional on its face and enjoining the University of the State of New York from enforcing the provisions of this statute.

The corporate appellant, referred to as "NPAP", is a membership corporation which is incorporated under New York State law for the advancement of psychoanalysis as a science (Education Law § 216). It is not authorized by its corporate charter to provide instruction and training or to operate as a training school for psychologists or in any other way as a school, college or university, yet it has operated a training program to prepare interested persons to practice or teach *psychoanalysis* under the guise of preparing them for membership. Each of the individual appellants holds a Ph. D. degree in psychology or related subjects, granted by European universities, and each has been a practicing psychologist in the State of New York for at least ten years.

Article 153 was added to the Education Law in 1956, and became effective on April 17 of that year. This statute provides that no person shall represent himself as a psychologist within the meaning of the statute unless certified and registered as therein prescribed. *It thus prohibits no one from practicing psychology, but only proscribes the professional use of the title "psychologist", and its derivatives by persons not certified in connection with services to the public.* As in other similar statutes, this statute provides, in § 7601 thereof, a guide for deter-

mining when a person is represnting himself as a psychologist or is rendering psychological services within the meaning of such statute. The statute also prescribes the educational and experience requirements necessary for certification (§ 7605); and provides penalties for violations of its provisions by non-certified persons (§ 7608).

Message of the Governor in Approving the Bill

"This bill recognizes and gives status to the profession of psychology. It prohibits any person in the State of New York from calling or holding himself out as a psychologist and accepting pay for performing psychological services unless he has been certified by the State Education Department.

To accomplish this, a board of examiners, in psychology is established under the State Education Department for the purpose of establishing minimum requirements and appraising the qualifications of persons applying for certification.

A certificate will be issued to any person with good moral character who meets the educational and experience requirements and satisfactorily passes an examination in psychology. However such examination is not required of persons who meet the educational and experience requirements on or before July 1, 1957 or of honorably discharged veterans who meet such requirements on or before July 1, 1958.

This bill is the result of the joint efforts of the Commissioner of Mental Hygiene, the State Education Department, the Joint Council of New York State Psychologists on Legislation, the New York State Medical Society, the American Psychological Association and the American Psychiatric Association.

The bill is approved by the following State departments and private organizations: Department of Men-

tal Hygiene, Department of Education, Department of Health, Division of the Budget, New York Society of Clinical Psychologists, American Veterans Committee, Syracuse Psychological Association, Nassau County Psychological Association, Brooklyn Psychological Association, Rochester Psychological Association, New York Personnel and Guidance Association, New York State Psychological Association, Westchester County Association of Psychologists, Psychological Association of Western New York, Rockland County Psychological Association, Suffolk County Psychological Association, Individual Psychological Association of New York, National Psychological Association for Psychologists, Group for Freudian Psychotherapy, Post Graduate Center for Psychotherapy, Association of Psychologists in New York Schools and Syracuse-Onondaga Council of Social Agencies.

In addition, numerous eminent psychologists and educators have written urging approval of this bill.

Similar legislation has already been enacted by the States of Connecticut, Maine, Minnesota, Virginia, Kentucky, Georgia, Washington, Arkansas and Tennessee.

The bill is approved.

AVERELL HARRIMAN."

State Proceedings

In their complaint, appellants alleged that by reason of the enactment of this statute NPAP was threatened with grave injury and irreparable loss in that its training program for its prospective members was not acceptable as the equivalent of the educational requirements for certification, resulting in a loss of trainees and a *possible* discontinuance of the publication of its quarterly journal, thus rendering its charter "valueless".

It was further alleged that the individual appellants might not be able, after the law became effective as to them, to continue to hold themselves out to the public, or render services to the public, as psychologists, the loss of which privilege would result in immediate and irreparable loss, injury and damage to them in reputation and in the practice of their profession.

After answer, appellants moved in the Supreme Court, New York County for summary judgment, and appellees cross-moved for judgment dismissing the complaint as insufficient in law. The motion for dismissal was denied. However, in determining a motion for summary judgment, the Court may grant judgment to any of the adverse parties entitled thereto (N. Y. Rules of Civil Practice 113). In accordance with such provisions, the Court granted the motion for summary judgment in favor of defendant to the extent of directing the entry of judgment declaring that Article 153 of the Education Law was *not* unconstitutional.

The Court's opinion extensively discussed Article 153 of the Education Law and the contentions here at bar (18 Misc. 2d 722). It found that appellants had not overcome the presumption of validity of the challenged statute and had not demonstrated that the provisions thereof were in violation of the State or Federal constitution.

On appeal, the judgment of the State Supreme Court was affirmed unanimously, without opinion, by the Appellate Division, First Department, and affirmed unanimously by the New York Court of Appeals. The comprehensive opinion of the Court of Appeals is annexed to the Jurisdictional Statement at pages 14-21.

The absence of any justiciable controversy or standing upon this appeal, the appeal is moot as to the individual appellants.

The individual appellants have since the commencement of the action in the Supreme Court of New York obtained

certification under the statute. They applied for and obtained the benefits of the statute and are now in the class of those entitled to use the title "psychologist" (Juris. St. p. 14). Three of the individual appellants received such certification by June, 1959 and the remaining individual appellant in December, 1959. The New York Court of Appeals recognized that both the individual appellants and NPAP lacked any justiciable standing, but decided, nevertheless, to dispose of the appeal upon the merits because "the question involved is of important public interest and one likely to rise again".

The discretion exercised by that Court to render, in effect, an advisory opinion, is not available to appellants here. Appellants could not accept the benefits of the statutory provisions and continue with their attack upon its asserted unconstitutionality. *Fahey* v. *Mallonee*, 332 U. S. 245, 255; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348; *Engel* v. *O'Malley*, 219 U. S. 128, 135; *Buck* v. *Kuykendall*, 267 U. S. 307, 316; *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208.

Furthermore, the case as it reaches this Court has assumed the attribute of mootness. These individual appellants are no longer aggrieved (even if they were before the commencement of the action below). They have qualified and received certificates. They no longer have any individual interest. They are simply self-appointed private champions of an indefinite group of others in defiance of public health and welfare. This is a role for which they are miscast. *United Public Workers* v. *Mitchell*, 330 U. S. 75. The case of *Leonard* v. *Earle*, 279 U. S. 342, cited by appellants (Juris. St. p. 8), is not in point.

Moreover, NPAP never has had any justiciable interest, as the New York Court of Appeals implicitly held here, in accordance with the established principle that only a person whose legal rights are invaded can raise constitutional questions and then only as to the particular respect

by whih invasion is alleged to occur. *Doremus* v. *Board of Education*, 342 U. S. 429; *United States* v. *Raines*, 362 U. S. 17; *United States* v. *Ansani*, 240 F. 2d 216 (7 Cir.), cert. den. sub nom. *Milner* v. *United States*, 353 U. S. 936, rehearing den. 353 U. S. 978; *Hoffman* v. *O'Brien*, 339 U. S. 955.

NPAP's legal rights are wholly unaffected by the statute. As has been here pointed out, it had and has no corporate rights to train persons to become psychologists. In effect, NPAP had been exercising a quasi-licensing system in derogation of New York Law. *Matter of Fink* v. *Cole*, 302 N. Y. 216; *Murtha* v. *Monaghan*, 4 N. Y. 2d 897. It cannot, by assuming *unauthorized* corporate powers, allege that they are invaded by the statute. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 119, 144; *Matter of De Peyster's Estate*, 210 N. Y. 216.

The position of NPAP here is contrasted with that of appellant in *Pierce* v. *Society of Sisters*, 268 U. S. 510, cited by appellants, where this Court held that the schools had standing to challenge the statute before this Court only because it affected the legal right *for which they had been chartered* to receive pupils. This is not the case here.

The reference by appellants in the Jurisdictional Statement and the inclusion by appellants in the Appendix (pp. 21-22) of two asserted "unreported opinion(s)" should be stricken. *They were not and could not be part of the record in the New York Court of Appeals.* At folio 185 of the record in that Court, counsel for appellants conceded:

> "It was stipulated when the individual plaintiffs were added as parties, that these decisions and the orders entered thereon were without prejudice and NPAP does not claim that either of them has any binding effect on this Court" (the State Supreme Court).

This belated effort of appellants is on a par with the change in attitude of NPAP with respect to the challenged

statute. NPAP supported the statute at the time of its passage, and, as the New York Court of Appeals determined, instituted this action only when appellee failed to accept the *ultra vires* program of NPAP as satisfying the academic requirements of the statute, contrary to NPAP's expectation at the time it supported the statute (Juris. St. p. 20). NPAP can not, in good faith, claim to be aggrieved by a statute which it had a hand in having enacted.

No Substantial Federal Question is Involved, Nor is There Any Substantial Merit to the Appeal

A.

The regulation of psychologists by certification is a reasonable exercise of the police power of the states and presents no question of due process.

Regulation of callings and occupations has long been recognized as a proper exercise of the State's police power. *Breard* v. *City of Alexandria*, 341 U. S. 622; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 424; *Linehan* v. *Waterfront Comm. of N .Y. Harbor*, 347 U. S. 438, rehearing den. 347 U. S. 994; *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168. Particularly is this so in the case of professions or callings concerned with health. *Barsky* v. *Bd. of Regents*, 347 U. S. 442, 449, 451.

This regulatory method of certifying persons in certain professions (and trades) has been used and upheld for a long period of years in New York, as the New York Court of Appeals noted (Juris. St. p. 17); in other states, *Heller* v. *Abbess*, 134 Fla. 610, 184 So. 122; *Wangerin* v. *Wisconsin State Bd.*, 223 Wis. 179, 270 N. W. 57; and by this Court in *Lehmann* v. *State Bd. of Public Accountancy*, 263 U. S. 394. Here, as in the cases cited, rendition of services is not barred. Use of the title in the rendition of such services for a consideration is the concern of the statute. Thus, the Legislature has not extended its hand as far as it

might properly reach. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379.

The regulatory method is reasonable and substantially related to the objectives sought to be obtained for the protection of the public from incompetent and unqualified practitioners of psychology and, thus, the requirements of due process are satisfied ever since *Nebbia* v. *New York*, 291 U. S. 502, 525. The same form of regulation to eliminate the quack has been adopted in at least eleven other states. (Full licensing statutes have been enacted in four others.) Whether the particular method will, in fact, mitigate the evil is not an issue before this Court. *Beauharnais* v. *Illinois*, 343 U. S. 250, 262.

The extensive study of the problem of psychologists and the effect of the uncontrolled rendition by them of services is reported in the Governor's message, the record and the opinion of the New York Court of Appeals. This necessity to mitigate the evil was earlier discussed in 51 Columbia Law Rev. 473, 484-485 which concluded that the remedy could not be effective "unless the professional use by non-certificants of the very terms which have captured the popular imagination is proscribed". (See also footnote 85.)

The power of the Legislature to insist upon a standard of learning, such as the receipt of a degree, as a condition to the issuance of certificates is long established. *Bradwell* v. *State of Illinois*, 16 Wall. 130; *Dent* v. *West Virginia*, 129 U. S. 114; *Brearley School, Ltd.* v. *Ward*, 201 N. Y. 358, 363; *People* v. *Griswold*, 213 N. Y. 92. The requirements in § 7605.1 (Appendix p. 31) are in no respect unreasonable and appellant's objection based upon the "degree" requirement or the nature of the studies specified is devoid of constitutional substance. Cf. *Highland Farms Dairy Inc.* v. *Agnew*, 300 U. S. 608; *Institute etc.* v. *University of the State of New York*, 274 N. Y. 504.

The responsibility confided in the Board of Examiners to pass upon the acceptability of the applicant's experience (App. p. 32) does not furnish the Board with arbitrary power of exclusion. *Lieberman* v. *Van de Carr*, 199 U. S. 552; *Douglas* v. *Noble*, 261 U. S. 165. Its ruling is "subject to review by the commissioner at the request of the applicant" and, as the Court of Appeals noted (App. p. 15) there is the right of judicial review of any disposition refusing "to issue or renew a certificate" (§ 7607). It cannot be presumed that the Board and the Commissioner will apply the standards in the statute arbitrarily, *Lieberman* v. *Van de Carr*, 199 U. S. 552, 562, but if they should, their disposition is thus subject to judicial challenge and there is the requisite protection against abuse of power. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 616.

The standards and limitations set out in the statute are ample "to govern the exercise of the power of certification, and the attack on this ground (unlawful delegation) cannot be sustained * * *", as the New York Supreme Court held, citing, *inter alia*, *City of Utica* v. *Water Pollution Board*, 5 N. Y. 2d 164, 168. See also, *Matter of Dougherty* v. *State Harness Racing Comm.*, 309 N. Y. 992, reargument den. 1 N. Y. 2d 827; *Elitg Dairy Products* v. *Ten Eyck*, 271 N. Y. 488; *Mandel* v. *Board of Regents*, 250 N. Y. 173; *Matter of Bell* v. *Board of Regents*, 295 N. Y. 101. The New York Legislature has specified the standards in as detailed a fashion as is reasonably practicable under the circumstances, as appears from the New York Court of Appeals opinion. It was not required to do more. *Lichter* v. *United States*, 334 U. S. 742, 785; *American Power & Light Co.* v. *Securities and Exchange Comm.*, 329 U. S. 90, 105, *Linehan* v. *Waterfront Comm. of N. Y. Harbor*, 347 U. S. 438, reargument den. 347 U. S. 994; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Yakus* v. *United States*, 321 U. S. 424; *Stewart* v. *Bowles*, 322 U. S. 398, 407.

In any event, the question of delegation of power is not a federal question. The inquiry ends with the determination that the regulatory method is reasonable and substantially related to the objectives sought to be obtained, and does not confer an arbitrary discretion upon the administrative agency. *Nebbia* v. *New York*, 291 U. S. 502; *Douglas* v. *Noble*, 261 U. S. 165. Therefore, the extent of the discretion, or the definiteness of the standards contained in a state statute is "a question of state law". *Douglas* v. *Noble*, 261 U. S. 165, 168; *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608; *Lieberman* v. *Van de Carr*, 199 U. S. 552.

Discussion of the "void for vagueness" rule used in testing criminal statutes, emphasized by appellants, is, of course, not relevant to any of the provisions in the statute providing for certification. *Garner* v. *Los Angeles Board*, 341 U. S. 716, 722. Cf. *Yakus* v. *United States*, 321 U. S. 414, 488. Moreover, there has been no claim of threatened criminal prosecution under § 7608 (Appendix p. 33), the only section providing any criminal penalty.

In any event, that rule is fully satisfied here, as the New York courts pointed out in their opinions. The purpose of that rule is to give the accused sufficient warning of the kind of activity which is made criminal. *Communications Ass'n* v. *Douds*, 339 U. S. 382, 413. Appellants are not compelled to guess or estimate what is intended by this statute. The Legislature used words and phrases well enough known to enable persons of reasonable understanding to accurately construe its provisions. This is all that is required. *Roth* v. *United States*, 354 U. S. 476, reh. den. 355 U. S. 852; *United States* v. *Petrillo*, 332 U. S. 1; *Nash* v. *United States*, 229 U. S. 373. The New York Court of Appeals said, in this connection (Appendix, p. 20):

> "The short answer to this thoroughly untenable argument is that section 7605, in practical effect, defines a psychologist as an individual who meets prescribed

standards of fitness, and since the statute merely prosecutes *the use of specific words to describe* the rendition of services, without making it criminal for non-certificants to render such services, no further definition of that term is constitutionally required or necessary (See *Pitts* v. *State Bd. of Examiners of Psychologists*, 222 Md. 224, 160 A. 2d 200, 201). The statute is easily complied with by the non-use of particular words, and hence it completely satisfies the requirement that a criminal statute must be sufficiently definite, clear and positive to give unequivocal warning to citizens of the rule which is to be obeyed" (*People* v. *Firth*, 3 N. Y. 2d 472, 474).

B.

Any other constitutional objections are, likewise, insubstantial.

In the course of the allegations of their amended complaint, appellants alleged also violation of the First Amendment, but neither in the brief before the New York Appellate Division nor that submitted to the Court of Appeals was there any discussion of that averment, and we stated in our brief in the Court of Appeals (p. 4), "we assume it has been abandoned". In this Court, the appellants refer to the First Amendment (Juris. St. pp. 2, 4), which they did not argue below, but completely fail to show any basis for any assertion that such amendment bars the states from protecting the public against charlatans and incompetent quacks by proscribing the use of the title "psychologist" in connection with the rendition of services. Furthermore, there is no substance to any "equal protection" argument. The reasonableness of the provisions for the certification of psychologists and their direct relation to the purposes of the legislation has been demonstrated under the discussion of due process, *supra*. Legislation satisfying these standards does not deny equal protection of the laws. *Railway Express* v. *New York*, 336 U. S. 106.

Appellants, in their amended complaint, urged that the statute deprived "qualified persons" of "the rights, privileges and immunities secured to them by the First and Fourteenth Amendments of the Federal Constitution". No specific reference was made to the privileges and immunities clause of Article IV, § 2 of the Constitution. Nevertheless, it should be pointed out that no discrimination against citizens of other states in favor of local citizens exists under the statute. *Douglas* v. *N. Y., N. H., & H. R., Co.*, 279 U. S. 377; *Hague* v. *C.I.O.*, 307 U. S. 496, 511; *Madden* v. *Kentucky*, 309 U. S. 83, 92; *Slaughter House* case, 16 Wall. 36.

It is manifest that no merit exists as to any of these contentions of appellants and that the appellants fail to set forth any substantial ground for attacking the validity of Article 153. Therefore, we respectfully urge that this appeal be dismissed, or the judgment of the New York Court affirmed.

CONCLUSION

The appeal should be dismissed, or the judgment affirmed.

Dated: New York, N. Y., January 3, 1961.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 568

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., THEODOR REIK, SANDOR FODOR, EDWARD FRANKEL, and SAUL GUREVITZ,

Appellants,

against

UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellee's motion to dismiss or to affirm the court below, received on January 6, 1961, is based on claims 1) that no substantial federal question is involved; 2) that the appeal is devoid of merit; 3) that it is moot as to the individual appellants; and 4) that the corporate appellant (NPAP) lacks standing (Motion p. 1).

This brief is intended to supplement the Jurisdictional Statement, and is limited to movant's 3 and 4 above.

The Individual Appellants Have Standing Despite *Pendente Lite* Certification

The doctrine of estoppel is not applicable. One does not lose his right to test the constitutionality of a statute by not incurring the peril of defiance *pendente lite*.

Gidney v. *Marlton*, 258 N. Y. 355;
Robins D. D. & R. Co. v. *Robinson*, 271 U. S. 649.

Their position is that the statutory failure to define psychology and psychological services continues to subject them to the threat of criminal penalties under a statute too vague and indefinite for constitutional validity.

Even after certification, certificants-appellants are required to make biennial fee payments under pain of penal sanctions and loss of certification (§ 7606, Appendix 33). The certificate may be suspended or revoked, on proof that certificant has been guilty of fraud or deceit in connection with his services rendered as a psychologist, or has been guilty of unprofessional conduct (§ 7607.1, Appendix 33). Violations of the provisions of the Act, which include the above, is a misdemeanor punishable by imprinsonment "for not more than six months or by a fine of not more than $500, or by both . . . and each violation shall be deemed a separate offense" (§ 7608, Appendix 33).

> "A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them' ".
>
> *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111-113.

The Standing of the Corporate Appellant (NPAP)

While this is presented in the Jurisdictional Statement (pp. 10-11) the emphasis created by appellee's motion seems to require some discussion.

Unreported decisions of the Supreme Court of the State of New York sustaining the justiciable interest of NPAP, made when it was the sole plaintiff, were included (Appendix 21, 22) without claim that they were a binding adjudication. Appellants felt that the rules of this court

required inclusion, and that they were of interest, if only academic, as an issue that had been exhaustively presented to the court of original jurisdiction.

Appellee now claims that NPAP is not affected by the Statute because it is not chartered as a psychology school. The New York Education Law does not require that psychology schools be chartered. Appellee had approved NPAP's certificate, which expressly permits it "to provide professional inspiration for training and research in the field of psychoanalysis" (32-35, 38).

Neither statute nor charter forbids NPAP from conducting its training program for the purpose of qualifying members. The charter is broad enough to authorize the training program it conducts for this purpose. Even if this presents a question of fact, NPAP's claim that it can legally conduct such a program should be accepted as pleaded.

Where denial of a constitutional right is claimed, even factual matters may be reviewed on appeal.

> *Niemotko* v. *State of Maryland*, 340 U. S. 268, 271; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 506.

The right of the school to bring suit in *Pierce* v. *Society*, 268 U. S. 510, was unanimously upheld despite the fact that the statute had not yet become effective, and did not prohibit, regulate, tax, require registration of, nor otherwise impinge directly on, private schools.

> cf. *Barrow* v. *Jackson* (1953), 346 U. S. 249.

The motion should be denied with costs.

Respectfully submitted,

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